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Chairman: Mr. Verweij (Vice-Chairman) ..... (Netherlands)

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In the absence of Mr. Enkhsaikhan (Mongolia), Mr. Verweij (Netherlands), Vice-Chairman, took the Chair.

The meeting was called to order at 3.15 p.m.

Agenda item 148: Convention on jurisdictional immunities of States and their property
(A/53/274 and Add.1)

1. **Ms. Cardoze** (Panama), speaking on behalf of the Rio Group, said that an international treaty setting forth the basic principles of jurisdictional immunity would help eliminate uncertainty in the conduct of international relations.

2. The Rio Group supported the idea of convening a conference of plenipotentiaries, as provided for in General Assembly resolution 49/61, and believed that the time had come for the Sixth Committee to resume its work on the proposal. A working group should be established during the fifty-fourth session of the General Assembly to identify in greater detail those aspects of the draft articles prepared by the International Law Commission that might need adjustment. It would serve no purpose to continue postponing discussions on such an important topic.

3. **Mr. Nagaoka** (Japan) said that historical perspectives should be taken into account in considering what kinds of State conduct enjoyed jurisdictional immunities. In recent years, State organs had greatly expanded, and their work was closely related to the activities of individual citizens. Thus, the idea that State organs could enjoy absolute immunity, no matter what conduct they engaged in, was no longer valid. That did not mean, however, that the idea of jurisdictional immunities should be abandoned entirely.

4. State practices regarding jurisdictional immunities were based on either the doctrine of absolute immunity or on that of restrictive immunity; that led to confusion in the rules of international trade. It would therefore be useful to conclude a convention that allowed sufficient flexibility to ensure the wider participation of States and the harmonious development of State practices. In that regard, the approach taken and the basic ideas expressed in the draft articles on jurisdictional immunities of States and their property remained valid (A/49/10, chap. II.D), and provided a solid basis for further discussion. Some aspects of the draft articles, however, reflected State practices which had prevailed during the cold war era. Recent developments in the field, particularly during the 1990s, should be taken into account. His delegation supported the establishment of a working group during the fifty-fourth session of the General Assembly, as provided for in resolution 52/151. It would be helpful if the International Law Commission could submit to the Sixth Committee its comments on the draft articles in the light of recent developments. Nevertheless, the work of the Commission must be regarded as supplementary to that of a working group, and reconsideration of specific articles by the Commission would not be acceptable.

5. **Mr. Gao Feng** (China) said that since the end of the Second World War, the functions of the State had become more complex, and there were more instances of States engaging in international trade and transactions on their own behalf. Some of those commercial transactions were for profit, but others sought to promote public welfare, for example, purchasing wheat for disaster relief purposes. If a State engaged in a transaction in order to promote public welfare, it was obviously inappropriate for a foreign court to exercise jurisdiction over the State when it had not expressly given up immunity beforehand. There were also many instances of State enterprises engaging in commercial transactions on their own behalf, and as independent entities they should be responsible for their own operational activities. If they were authorized by the State to engage in commercial transactions on its behalf, then in accordance with the principle of agency in ordinary civil law the State should be responsible for the operational activities of those State enterprises. There were many other important issues of principle concerning States and their property on which international law offered no uniform theoretical model. Among the great majority of States, the question of immunity had been handled in accordance with the general principles of civil law and practice in their domestic legislation. In some States, practice had not been consistent over time.

6. Precisely because international practice and international law varied on the question of State immunity, it was necessary to discuss and draft an international convention. Nevertheless, there was still no broad consensus on the matter, and the solution of the problem depended on the further development of international practice and the corresponding development of theory. In the view of his delegation, the time had not yet come for the convening of a diplomatic conference to conclude a convention on the matter of jurisdictional immunities of States and their property.

7. His delegation supported the establishment of a working group during the fifty-fourth session to consider the issues that still needed to be resolved.

8. **Mr. Alabrune** (France) said that his delegation was in favour of drawing up an international convention on jurisdictional immunities of States and their property. An international convention would help limit the proliferation

of legal norms and ensure greater uniformity in the law on the subject. As agreed by the General Assembly in its resolution 52/151, a working group of the Sixth Committee should be set up during the fifty-fourth session.

9. His delegation doubted the need to ask the International Law Commission for additional comments, but if that course were followed the Committee would have to specify the issues involved. In that context, given that very few States had submitted written replies on the draft articles, although his own delegation had done so in June 1997, it would be paradoxical to ask the Commission to take account of State practice. Moreover, any consultations with the Commission should not cause the Committee to lose sight of the General Assembly's often expressed aim – for example in its resolution 49/61 – that an international conference of plenipotentiaries should be convened to conclude a convention on the subject.

10. **Mr. Politi** (Italy) said that his delegation would like to see the adoption of a widely accepted international convention on jurisdictional immunities of States and their property which would provide States and private parties with greater certainty on a wide range of litigations and would also be of great benefit to international trade. His Government was ready to contribute towards the search for balanced solutions to unresolved issues; however, Italy could not renounce some important features of its long tradition in the area of jurisdictional immunity unless truly widespread agreement was reached. It would make little sense to abandon a long-established court practice for a convention that would be applied in a limited number of countries.

11. His delegation supported the idea of continuing the discussions on the draft articles adopted by the International Law Commission and establishing, at the fifty-fourth session of the General Assembly, a working group of the Sixth Committee. It also agreed with the proposal to invite the Commission to present, before the fifty-fourth session, its comments and recommendations on the draft articles, in the light of the results of the informal consultations held in the Committee in the past and taking into account the most recent developments with respect to State practice. At the same time, his delegation was not sure that it would be desirable to set specific deadlines for the conclusion of the discussions in the working group or to envisage, at the current stage, the convening of a diplomatic conference for the adoption of a convention. It would be preferable to assess the results achieved by the working group before deciding on any further steps to be taken.

12. **Mr. Rosenstock** (United States) said that his Government could not accept the draft articles on jurisdictional immunities of States and their property in their current form. Without a clear and unequivocal provision incorporating the nature-only test, his Government would not be able to accept the convention. There was still no consensus on the matter, and trying to force the issue would only harden positions rather than facilitate consensus. It would not be productive to establish a working group at the fifty-fourth session of the General Assembly. The idea of asking the International Law Commission to take the matter up again, in addition to establishing the working group, seemed overambitious and premature. If a working group was set up at the fifty-fourth session, it might indeed decide that the Commission should be asked to reconsider certain specific issues. If, on the other hand, there was some basis for believing the Commission could make progress without direction from the Sixth Committee, it should be allowed to do so, and the Committee could then decide whether it made sense to establish a working group. If the Commission was not allowed to reopen existing articles, however, it was not clear what it would be able to accomplish. Considering the number of working groups that were being proposed for the fifty-fourth session of the General Assembly, it would not be wise to schedule one on jurisdictional immunity unless there was a reasonable basis for believing it would be useful.

13. **Mr. Marechal** (Belgium) said that although the status of diplomatic and consular missions – which acted as representatives of States – was governed by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, there was no framework of universal norms defining the jurisdictional immunities of States themselves. The elaboration of a convention on the matter would allow for greater harmonization of the rules applied by States in the conduct of their international relations. His delegation was in favour of setting up a working group at the fifty-fourth session of the General Assembly to study the most important aspects of the draft articles.

14. **Mr. Kachurenko** (Ukraine) said that his delegation supported the proposal to elaborate a convention on jurisdictional immunities of States and their property with a view to convening a diplomatic conference for the purpose of adopting such a convention. The establishment of a universal legal regime in that area would clarify the grey areas in international law and eliminate the existing disparities in practice. The draft articles drawn up by the International Law Commission should be used as the basis for the future convention. His delegation realized that there were still differences among States on several key issues

relating to the draft, but trusted that most of them could be resolved by delegations in the framework of a working group. The working group should carefully examine issues of substance in order to facilitate the conclusion of a convention and make concrete recommendations on how to address any issues that might be left pending for the conference. Sufficient time should be allocated for the meetings of the working group.

15. **Ms. Dickson** (United Kingdom) said that, conscious of General Assembly decisions on the issue, her delegation would address not the substance of the item but merely the course of action that the Committee should pursue. A working group should be established for the fifty-fourth session to examine the major issues relating to jurisdictional immunities in the light of recent developments in State practice and national legislation. It should also consider whether there were any specific issues on which the Commission's comments might be necessary. The working group, and subsequently the Commission, would thus have an opportunity to comment within a reasonable space of time. If the issue went back to the Commission, as her delegation would prefer, following consideration by the working group, it should be allowed more than one session and should be given specific issues to consider. Her delegation did not favour a general referral in the expectation of recommendations from the Commission in 1998.

16. **Mr. Lavalle Valdés** (Guatemala), after endorsing the statement by the representative of Panama on behalf of the Rio Group, said that the jurisdictional immunities of States and their property effectively belonged to the body of customary international law in cases where States acted *jure imperii*. Outside such specific cases, however, and despite the importance of the issue for international relations, international law played a passive role; no regime of what had been termed "ordered freedoms" had been established. The reason for that was that, despite the growth of international activity by States and the development of ideas, no new customary rules relating to jurisdictional immunities, nor a treaty of universal scope, had come into being. That had left the field open for some States to adopt detailed regulations and a regional convention. As a result, existing regulations owed more to comparative public law than to public international law of general application. The situation was potentially harmful. On a delicate and complex issue, which might become even more crucial in the future, there was no general law covering the basic issue. The situation was particularly strange in comparison with the status of diplomatic relations: diplomatic immunity was guaranteed under the Vienna Convention on Diplomatic Relations, to which 178 States were party and which had come to have the force of customary law.

17. That was why his delegation had, in 1991, supported the convening of an international conference of plenipotentiaries and, in 1994, been party to the General Assembly's adoption of its resolution 49/61, even though the latter was vitiated by the fact that the Assembly had not only omitted to set a date for such a conference but had deferred consideration of it until the fifty-second session. That deferral would have been understandable if there had been too little progress in examining the issue, but, as the relevant documents amply showed, the issue had been fully discussed. The time for action had come, yet General Assembly resolution 52/151 disappointingly restricted itself to the possibility of establishing a working group at the fifty-fourth session. It was to be hoped that such indifference to the issue, whether real or apparent, could be overcome and that the Commission's work could finally bear fruit.

18. **Ms. Telalian** (Greece), expressing her delegation's support for the elaboration of a convention establishing a uniform regime which would give greater security to States and eliminate existing disparities, which were due to the wide variety of national rules, said that a working group should be established at the fifty-fourth session in accordance with General Assembly resolution 52/151, with a view to the convening of a conference in the near future. The working group should consider unresolved issues and seek a compromise on the basis of the draft articles. Her delegation doubted the usefulness of asking the Commission to submit supplementary observations, in view of the poor response of States to the draft articles. If the Commission were requested to review specific problems, however, that should not be at the expense of the diplomatic conference.

19. **Mr. Morshed** (Bangladesh) said that the Commission's work on a complex and difficult subject constituted a major achievement towards the unification and codification of possible rules on the jurisdictional immunities of States and their property. His delegation supported the suggestion by the representative of Japan that a working group should be established at the fifty-fourth session and that a flexible referral of the issue should be made to the Commission for further comments.

20. **Ms. Cueto Milián** (Cuba) said that her Government had had recent direct experience of its property being subject to a unilateral interpretation by some States of the principles governing the jurisdictional immunities of States and their property. Any harmonization of rules would have to reconcile the principle of *par in parem imperium non habet*, and recent developments in international law, with the

current policy of States and the conceptual philosophy of the issue. The Committee should be governed by General Assembly resolutions 49/61 and 52/151, both of which contained clear provisions for future action. She saw no need to request further comments from the Commission, particularly since it was not obvious what issues it should consider. The Commission had a full agenda as it was. The Committee should simply establish a working group for the fifty-fourth session, in accordance with General Assembly resolutions.

21. **Mr. Šmejkal** (Czech Republic) welcomed the Commission's adoption of the draft articles on a complex and difficult issue. As the representative of Guatemala had said, it was regrettable that the issue was governed by customary international law. The relevant Czech domestic legislation was extremely sketchy, so the unification of international law would be most welcome and action should be taken to that end. The draft articles constituted a good basis for further work, but there was disagreement in some areas. Recalling that the issue had been under consideration already for many years, he said that a working group could move to bring together conflicting views, particularly with regard to the definition of a "State" and of "commercial transaction", although the latter task might be difficult; the same was true of the question of State immunity from measures of constraint. The Committee should not, however, be deterred by the possible difficulties. The working group should be established. A contribution from the Commission might be useful, but only on a flexible basis; in that way it could make recommendations within a short period of time without jeopardizing the establishment of the working group in 1999.

The meeting rose at 4.20 p.m.